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U.S. SENATE REPUBLICAN POLICY COMMITTEE

Legislative Notice

No. 5 February 20, 2009

S.160–District of Columbia House Voting Rights Act of 2009

Calendar No. 23

S. 160 was reported by the Committee on Homeland Security and Governmental Affairs with an amendment in the nature of a substitute favorably. No written report.

Noteworthy

- Pursuant to a unanimous consent agreement, at 11:00 a.m. Tuesday, February 24, the Senate will vote on the motion to invoke cloture on the motion to proceed to S. 160. If cloture is invoked, all post-cloture time will be yielded back and the motion to proceed agreed to.
- The text of S. 160 generally follows S. 1257, introduced in the 110th Congress, which sought to award the District of Columbia a full voting seat in the House. Cloture on the motion to proceed to S. 1257 was defeated 57-42 in September 2007.
- S. 160 expands the number of members of the House of Representatives by two, to 437, starting with the 112th Congress. One of the two new seats will be permanently allocated to the District of Columbia. The other seat will be apportioned to Utah for the 112th Congress, and thereafter to the state entitled to an additional House seat under normal reapportionment rules following the 2010 census.
- The constitutionality of providing the District voting representation in the House through ordinary legislation, rather than through constitutional amendment, has long been in doubt. S. 160 provides for expedited judicial review, but questions remain about what parties would have "standing" under Article III of the Constitution to bring a court challenge.
- Proponents of S. 160 argue that District of Columbia residents are entitled to a full voting member in the House, and that questions about the constitutionality of creating a House seat for the District through ordinary legislation can be resolved by the courts.
- Critics of S. 160 argue that creating a full House member seat for the District by legislation is unconstitutional, whatever the underlying merits of the proposal. Many also argue that the Founders had compelling good-government reasons for not granting the District a member in Congress, and that objections that District residents lack an effective voice in Congress are belied by the strong record of the Delegate in advocating for District residents' interests.
- While S. 1257 provided that the entire legislation would be void if any part were invalidated by a court, S. 160 narrows this "nonseverability" provision to allow the Act as a whole to stand, even if the language barring the District from being considered a state for purposes of Senate representation should be struck down in litigation seeking Senate representation.

Highlights

S. 160 expands the number of members of the House of Representatives from 435 to 437 beginning with the 112th Congress. The District of Columbia will be permanently allocated one of these seats. The other seat will initially be assigned to Utah and then be reallocated based on the next congressional apportionment following the 2010 census.

The legislation has three main elements:

1) It provides that the District of Columbia "shall be considered a Congressional district for purposes of representation in the House of Representatives." The law specifies that the District shall *not* be considered a state for purposes of representation in the Senate. The law also clarifies that the District remains entitled to three presidential electors as required by the 23rd Amendment.

2) The number of members of the House of Representatives will be permanently increased to from 435 to 437. The District will receive one permanent seat, and the 1929 reapportionment statute will be amended to state that the District may not receive more than one seat in a future reapportionment. Utah will receive one additional seat for the 112th Congress. The additional representative from Utah will be elected pursuant to a redistricting plan enacted by the state, which must account for the new seat, and which will be effective for the 112th Congress. The seat is subject to reapportionment after the 2010 census. Both new representatives will be seated on the same day as other members of the 112th Congress. The Office of the District of Columbia Delegate will be repealed.

3) The bill provides for expedited review of the Act's constitutionality by a three-judge panel of the United States District Court for the District of Columbia, which can be appealed directly to the Supreme Court. If a court invalidates the provisions granting the District a House seat or creating the second additional seat, the entire legislation is void. As a result of amendments made in committee on February 11, 2009, this "nonseverability" protection would not apply, however, to the provision in S. 160 that declares that the District "shall not be considered a State for purposes of representation in the United States Senate." Thus, advocates for Senate representation for the District may challenge that provision in court without the risk that remainder of the bill providing House seats to the District and one other state would be voided.

Background

From the time the District of Columbia was first created, its residents have never had full voting representation in Congress. District residents, like residents of four U.S. territories, are currently represented by a Delegate in the House of Representatives, who, under the current House rules, are empowered to introduce legislation and to vote in committee, including in conference committees and in the Committee of the Whole. Various attempts have been made to grant the

District full voting representation,[1] including: 1) a constitutional amendment to grant full voting congressional representation for residents of the District, but not providing statehood for the District;[2] 2) granting statehood to the "non-federal" portion of the District;[3] 3) allowing District residents to vote for a member of the Maryland delegation;[4] and 4) retrocession of the "non-federal" portion of the District of Columbia into Maryland.[5] None of these efforts has succeeded.

S. 160 attempts to grant the District full voting representation in the House through statute. Pursuing such a change in the composition and structure of Congress through statute rather than constitutional amendment raises a number of important constitutional questions. The plain language of the Constitution suggests that members of the House may come only from "the several States." [U.S. Const., Art. I, Sec. 2.] Previous attempts to argue that District residents are constitutionally entitled to full voting representation through a member in the House have been rejected by the courts. *See Adams v. Clinton*, 90 F. Supp. 2d 35, 46-47 (D.D.C. 2000).[6] Proponents of S. 160 contend that courts have treated the District as if it were a "state" for other purposes, including for District residents' access to federal courts, for imposition of federal taxes, and for District residents' rights to a speedy criminal trial. Advocates of S. 160 also argue that Article I, Section 8 of the Constitution empowers the Congress to legislatively grant the District congressional representation as part of its broad power to "exercise exclusive Legislation in all Cases whatsoever, over [the] District…" and that this includes the power to alter the composition of the House of Representatives to give the District a full member seat. Critics of this theory point out that the District Clause grants Congress the power to govern the District, but does not authorize the Congress, through ordinary legislation, to alter the structure and composition of the Legislative Branch of the federal government.

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[1] For a detailed history of such attempts, *see* Congressional Research Service Report for Congress RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, April 23, 2007.

[2] The idea of amending the Constitution to give the District full voting membership in Congress was first proposed in 1801 by a D.C. landowner and member of the city council. A constitutional amendment was first formally introduced in Congress in 1888, but the proposal was defeated. There have been over 150 proposals introduced since that time to amend the constitution to provide voting representation in Congress for District residents. *See id.* at CRS, 3-5. The most successful attempt at a constitutional amendment process came in 1978, when Congress approved an amendment, but the amendment ultimately failed when only 16 states ratified it within the seven-year period provided for ratification.

[3] The first proposal for D.C. statehood dates from 1921, but the most significant efforts to achieve statehood followed the failure of the 1978 constitutional amendment to grant the District voting representation. *See id.* at CRS,13-14.

[4] So-called "semi-retrocession" seeks to restore the status that District residents had in the period from 1791 to 1801, and has been proposed several times since the 1970s. *See id.* at CRS, 10-13.

[5] Proposals for full retrocession to Maryland have been made periodically since 1848, and were introduced in every Congress from the 101st through the 108th. *See generally id.* at CRS-8 – 10.

[6] Finding that "the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives." *Id.* The *Adams* court also found that including the District within the definition of "state" is inconsistent with the provisions of clause 3 of Article I, section 2, the clause that directly addresses the issue of congressional apportionment. That clause provides that "Representatives . . . shall be apportioned among ***the several States which may be included within this Union***, according to their respective numbers." U.S. Const. Art. I**,** § 2, cl. 3 (emphasis added).

Recent reviews of the constitutional issues by CRS concluded that it is "likely that the Congress does *not* have authority to grant voting representation in the House of Representatives to the District of Columbia…"[7] (emphasis added).

Aside from the merits of the constitutional issues raised by S. 160, there are also questions about whether the courts would be able to rule on those constitutional questions in the foreseeable future. In order for a legal challenge to be heard in the federal courts, a case would need to be brought by a party with "standing" to do so under the Supreme Court's rulings interpreting Article III of the Constitution. S. 160 contains an expedited judicial review provision that provides for accelerated review before the District Court for the District of Columbia, followed by direct appeal to the U.S. Supreme Court. But the Supreme Court's decision in a prior challenge to the Line Item Veto Act casts significant doubt on whether any member of Congress—or any individual voter—would have standing to bring such a challenge to the constitutionality of this Act. *See Raines v. Byrd*, 521 U.S. 811 (1997).

Finally, the language of S. 160, as amended in committee, narrows the "nonseverability" provision that was designed to ensure that the entire bill would stand or fall as a whole. Prior versions of the bill have provided that the entire Act would "be treated and deemed invalid and have no force or effect of law" if "*any provision of this Act* or any amendment made by this Act is declared or held invalid or unenforceable."[8] The bill as reported out of committee, however, provides that the entire Act will be invalidated only if "any provision of section 2(a)(1), 2(b)(1), or 3 [of the Act] or any amendment made by those sections" is found invalid or unenforceable by a court.[9] The sections covered by this language are those which award the District a voting member seat in the House and which create the additional seat that will be allocated, for the 112th Congress, to Utah. This more narrow language in the bill on the Senate floor, however, excludes from "nonseverability" protection the section of S. 160 that provides that the District shall not have representation in the Senate. A successful court challenge to that provision dealing with Senate representation, therefore, will not invalidate the entire bill.

Legislative History

110th Congress

House of Representatives. H.R. 1905, a bill to create a full House member seat for the District of Columbia, was introduced by District of Columbia Delegate Eleanor Holmes Norton on April 18, 2007. The bill was reported to the House floor by the Judiciary Committee on the same day, and passed the House on April 19, 2007 by a vote of 241-177. The House bill differed from the Senate bill in that it created an at-large district for the new seat granted to Utah (which raised constitutional concerns) and did not contain provisions for expedited judicial review.

[7] Congressional Research Service Report to Congress RL33824, "The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole," February 17, 2009 [Hereinafter "CRS Report on Constitutionality"].
[8] S. 160, Sec. 6, as introduced (emphasis added).
[9] S. 160, Sec. 7, as reported.

Senate. S. 1257 was introduced by Senator Lieberman on May 1, 2007, and a hearing was held on May 15, 2007. S. 1257 was favorably reported by the Homeland Security and Government Affairs Committee by a vote of 9-1 on June 28, 2007. A cloture vote on the motion to proceed to S. 1257 was held on September 18, 2007, and cloture was not invoked by a vote of 57-42.

111th Congress

House of Representatives. Two bills designed to award the District of Columbia a full seat in the House are pending in committee. H.R. 157, introduced by District of Columbia Delegate Norton and pending in the Judiciary Committee, is most similar to S. 160, but omits several significant terms contained in S. 160, including the language expressly prohibiting the District from being considered a state for purposes of Senate representation and the expedited judicial review language contained in the Senate bill. H.R. 665, introduced by Representative Rohrabacher and pending in the Administration Committee, the Oversight and Government Reform Committee, and the Judiciary Committee, proposes to grant District residents representation in the House through "semi-retrocession," i.e. by permitting District residents to vote for a House member who would be part of the Maryland delegation, effectively restoring the *status quo* from the 1790 until 1801.

Senate. The Committee on Homeland Security and Governmental Affairs approved S. 160 by a vote of 11-1[10] on February 11, 2009, and the bill was favorably reported to the floor with an amendment in the nature of a substitute on February 12, 2009, without a written committee report.

No hearings on the bill have been held in this Congress. Cloture on the motion to proceed to S.160 was filed on February 13, 2009. A cloture vote on the motion to proceed to S. 160 is currently scheduled for 11:00 a.m. Tuesday, February 24th.

Bill Provisions

Section 1. Provides the short title as the "District of Columbia House Voting Rights Act of 2009."

Section 2. Provides that the District of Columbia "shall be considered a congressional district for purposes of representation in the House of Representatives." Also provides that the District shall not have Senate representation, and that the District may not receive more than one House seat in any future reapportionment. Also clarifies that the 23rd Amendment controls in providing the District with three electoral votes.

Section 3. Permanently increases the number of House seats to 437, and instructs that the second additional seat is to be awarded to Utah for the 112th Congress, in accordance with the results of the 2000 census. Following the 2010 census, this additional seat is to be awarded to whichever

[10] Including proxy votes, the vote was 12-4.

state is entitled to that seat under the reapportionment rules set forth in the 1929 apportionment act (2 U.S.C. 2a).

Section 4. Provides that the additional seat for Utah in the 112th Congress shall be elected pursuant to a redistricting plan enacted by the state, which adjusts the boundaries of Utah's congressional districts to take account of the additional seat, and which will remain in effect until the reapportionment that follows the 2010 census.

Section 5. Provides that the two additional members (from the District of Columbia and from Utah) shall be seated beginning on the first day of the 112th Congress.

Section 6. Repeals the Office of District Delegate and the Office of Statehood Representative, and makes a number of conforming amendments to the U.S. Code dealing with appointments to the military service academies.

Section 7. Provides that the entire bill shall be nullified if the provisions awarding the District a single permanent House seat or the provisions creating and awarding the additional seat to Utah only for the 112th Congress are struck down in court. As noted above, the provision expressly denying representation for the District in the Senate is excluded from this "nonseverability" clause.

Section 8. Provides for expedited judicial review of the constitutionality of this Act before a three-judge panel of the District Court for the District of Columbia, with direct appeal to the Supreme Court. There is currently no language in the bill expressly authorizing members of Congress or any other aggrieved party a right to sue to present that legal challenge to the courts.

Cost

The Congressional Budget Office (CBO) estimates that the legislation would increase direct spending by about $140,000 in 2011 and by about $2 million over the 2011-2019 period. In addition, implementing the bill would have discretionary costs of about $1 million in 2011 and about $7 million over the 2011-2014 period, assuming the availability of appropriated funds.